

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Petition of Time Warner Cable for)	WC Docket No. 06-55
Declaratory Ruling that Competitive)	
Local Exchange Carriers May Obtain)	
Interconnection Under Section 251 of)	
The Communications Act of 1934, as)	
amended, to Provide Wholesale)	
Telecommunications Services to VoIP)	
Providers.)	

REPLY COMMENTS OF THE NEBRASKA PUBLIC SERVICE COMMISSION

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SUMMARY

The Petition filed by Time Warner should be dismissed, or in the alternative, should be denied. A number of commenters characterize the NPSC's decision as one which declares that wholesale providers of telecommunications services have no statutory right to interconnect pursuant to Section 251 of the Act. A review of the NPSC's order reveals that is not what the NPSC held. A number of commenters also claim that the NPSC's order impacts the characterization of VoIP providers. Again, these comments have nothing to do with the NPSC's decision in the Sprint arbitration case. The Commission should completely disregard these comments as they misconstrue the decision of the NPSC.

The NPSC has consistently recognized the need for a vital and robust competitive market in Nebraska. Its decisions support this goal. However, the NPSC cannot ignore the evidence presented in proceedings before it and cannot make arbitrary decisions because it may want to bring about a certain result. The NPSC's arbitration case was decided on the facts presented and the decision was a proper application of the law in that case. Accordingly, the Commission should dismiss or deny the Petition.

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COMMENTS OF THE NEBRASKA PUBLIC SERVICE COMMISSION

Pursuant to the Federal Communications Commission's (Commission's) *Public Notice*¹, the Nebraska Public Service Commission (NPSC) hereby submits the following reply comments in response to the Petition for Declaratory Ruling filed by Time Warner Cable ("Time Warner").² The NPSC appreciates the opportunity to reply to the comments submitted in this case.

I. INTRODUCTION AND SUMMARY

The NPSC has taken great effort to encourage competitive entry into the marketplace and to promote the development of new and emerging technologies. The NPSC has openly embraced the entry of VoIP providers into Nebraska local markets and has worked with a number of newly developing VoIP start-up companies to facilitate

¹ *Pleading Cycle established for comments on Time Warner Cable's Petition for Declaratory Ruling that Competitive Local Exchange Carriers may Obtain Interconnection to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, Public Notice (March 6, 2006) ("*Public Notice*").

² *In the Matter of the Petition of Time Warner Cable for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-54 (March 1, 2006) ("*Petition*").

entry into Nebraska. The NPSC has certificated VoIP providers such as Time Warner so that they can enter the market and compete with the incumbent carriers and with other competitive local exchange carriers. As a testament to the competitive landscape in Nebraska and the NPSC's treatment of competitive local exchange carriers generally, the Commission recently granted part of Qwest Corporation's forbearance petition in the Omaha market.³

The attempt by some of the commenters to cast the NPSC's arbitration decision⁴ as "anti-competitive" should be disregarded. The NPSC weighed the evidence presented in the arbitration case and made a decision based on the facts presented. A majority of the NPSC decided that Sprint failed to demonstrate it was a "telecommunications carrier" pursuant to 47 U.S.C. § 153(44). The NPSC cannot simply ignore the evidence in a given case to bring about a certain result. As many of the comments support, the NPSC's arbitration decision was based on a correct statement of the law. The NPSC made the correct determination in light of the evidence presented at the hearing.

³ See *in the Matter of the Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, MEMORANDUM OPINION AND ORDER (rel. December 2, 2005).

⁴ See *Sprint Communications Company, L.P., Overland Park, Kansas, Petition for Arbitration under the Telecommunications Act, of Certain Issues Associated with the Proposed Interconnection Agreement between Sprint and Southeast Nebraska Telephone Company*, Application No. C-3429, Order, (September 13, 2005) ("NPSC Arbitration Decision").

II. ARGUMENT

A. The Time Warner Petition Should be Dismissed as it Relates to the NPSC

The NPSC filed initial comments on April 10, 2006 opposing Time Warner's petition and seeking a dismissal of the Petition filed with the Commission on March 1, 2006. The NPSC has yet to receive an original Petition from Time Warner. The NPSC renews and incorporates its request for dismissal of the Petition in these comments.

In addition, the comments filed by the other providers in this proceeding make clear that there is no "controversy" or "uncertainty" in the law as it relates to the case decided by the NPSC. What is also made clear by the Petition and the comments is that the concerns regarding interconnection and VoIP providers (which was not an issue in the NPSC decision) is already being considered by the Commission in its generic IP-Enabled Services NPRM.⁵ Time Warner uses this Petition to find a venue for further discussion of issues already under consideration by the Commission in its generic IP-Enabled Services NPRM. Time Warner cannot reasonably attribute these issues to the NPSC arbitration decision. Time Warner's concern with the treatment of VoIP providers will be determined after the Commission resolves the issues raised in the IP-Enabled Services NPRM. In addition, several commenters capitalize on the opportunity to argue the VoIP issue raised by Time Warner in its Petition; however, this was not an issue in the case the NPSC considered. Therefore, with respect to the NPSC arbitration decision, these comments should be disregarded. As there is no outstanding

⁵ See *In the Matter of IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking (rel. March 10, 2004)("IP-Enabled Services NPRM").

“controversy” or “uncertainty” it relates to the NPSC, the Commission should dismiss the Petition accordingly.

B. The NPSC Did Not Determine that Wholesale Providers Are Not Telecommunications Carriers

The Petition and some of the commenters generally characterize the NPSC’s decision as one which held that wholesale providers are not entitled to interconnection pursuant to Section 251. The NPSC arbitration decision made no such finding. The NPSC did not place any emphasis on the term “wholesale”, rather it made a factual determination that Sprint was not a “telecommunications carrier” because it did not hold itself out indifferently to a class of users. In error, some of the commenters simply adopted Time Warner’s mischaracterization of the NPSC’s findings. For example, one commenter partially referring to the NPSC’s decision states “the state decisions under review here have erred in assuming that CLECs that provide service to VoIP providers or other ISPs are operating as wholesale carriers”⁶ That is a complete mischaracterization of the NPSC’s findings. The NPSC’s decision was not based upon a retail or wholesale distinction, rather, the NPSC’s decision was based upon whether Sprint was a “telecommunications carrier” as defined by the Act. Contrary to these

⁶ Comments of Broadwing Communications, LLC, Fibertech Networks, LLC, Integra Telecom, Inc., Lightyear Communications, Inc. McLeodUSA Telecommunications Services, Inc., MPower Communications Corp., Norlight Telecommunications, Inc., Pac-West Telecomm., Inc., at 2 (“Broadwing comments”). *See also* Sprint Nextel Corporation’s Comments in Support of Petition for Declaratory Ruling at 15 (“Sprint Nextel Comments”).

comments, the NPSC's order did not say that a "wholesale" provider could not be a "telecommunications carrier."⁷

C. The NPSC was Correct in Finding Only Telecommunications Carriers have the Right to Interconnection Under the Act

All who commented on this issue agreed that an entity must be a common carrier in order for it to be a "telecommunications carrier" as defined in 47 U.S.C. § 153(44).⁸ The commenters also agreed that the test requires a common carrier to "hold itself out indiscriminately to serve all within that class."⁹ The NPSC correctly held that under federal law an entity must make its services available indifferently to all potential users.¹⁰ There is no controversy or uncertainty as to the test the NPSC applied. The NPSC applied the appropriate test and made a decision based on the facts presented that Sprint was not offering its service indifferently to all potential users. No commenter claimed the NPSC used the wrong test to define "telecommunications carrier." It is clear that is not the case. There is no uncertainty or controversy as to federal law.

Contrary to some of the comments, the NPSC did not solely determine that Sprint was offering these services as a private carrier based on the fact that Sprint had only one customer, however persuasive this may have been. Nor did the NPSC base its

⁷ *Id.* at 5.

⁸ *See Virgin Islands Telephone Corporation v. FCC*, 198 F.3d 921, 927 (D.C. Cir. 1999) ("VITELCO").

⁹ *United States Telecom Association v. FCC*, 295 F.3d 1326, 1329 (D.C. Cir. 2002) *quoting Iowa v. FCC*, 218 F.3d 756, 759 (D.C. Cir. 2000).

¹⁰ *Id.* at 7, *citing National Ass'n of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) ("NARUC I").

decision solely on the fact that Sprint's offering was by contract.¹¹ The NPSC made its determination based on all of the information it had before it including the testimony Sprint provided at the hearing. The NPSC found that the testimony of Sprint that it would offer its service indiscriminately was insufficient to base a finding that it was a telecommunications carrier in light of the fact that its actions did not support that finding. There was no error in this finding. It is well known that self-proclamation is not sufficient to demonstrate common carrier status.¹² The Court in *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994)(“*Southwestern Bell*”) found that the company's *actions* are to be considered when determining whether the company is a common carrier or private carrier. In particular, the Court said “[i]f the carrier chooses its clients on an individual basis and determines in each particular case ‘whether and on what terms to serve’ and there is no specific regulatory compulsion to serve all indifferently, the entity is a private carrier for that particular purpose.”¹³ In the arbitration case, NPSC weighed the credibility of the witness testimony presented on both sides of the case and reviewed the evidence provided to support the statements. The majority of the NPSC did not give great weight to Sprint's testimony because it lacked the necessary evidentiary support. The NPSC made a reasonable determination that Sprint was not acting as a telecommunications carrier in this particular instance.

¹¹ See, e.g., Joint Comments of BridgeCom International, Inc. Broadview Networks, Inc. CTC Communications Corp., NuVox Communications, Xspedius Communications LLC and COMPTel at 9.

¹² See Comments of Southeast Nebraska Telephone Company and the Independent Telephone Companies (filed April 10, 2006) at 20(SENTCO Comments).

¹³ *Southwestern Bell*, 19 F.3d 1475, 1481 (D.C. Cir. 1994).

D. The NPSC Did Not Make any Findings Characterizing VoIP Providers

Some commenters incorrectly phrase the NPSC decision in terms of Time Warner's VoIP offering.¹⁴ The NPSC did not make any findings relative to Time Warner's VoIP offering in the arbitration decision. To be sure, neither party to the NPSC case characterized the relevant issues in terms of VoIP services. Sprint provided testimony that it did not believe Time Warner's offering constituted what the industry defined as VoIP service.¹⁵ Sprint also stated that the issue of VoIP was irrelevant for the purposes of the arbitration proceeding.¹⁶ As Time Warner was not involved in the arbitration proceeding, the nature of its service was not at issue. The NPSC looked only at the nature of Sprint's service. Accordingly, there was no legal "uncertainty" or "controversy" which has ensued by the NPSC decision with respect to Time Warner's service or to VoIP providers generally.

In addition, the NPSC was not blocking Time Warner's ability to seek interconnection and potentially compete with other carriers in those markets.¹⁷ In an earlier proceeding, with which Time Warner does not take issue, the NPSC granted Time Warner a certificate of operating authority. In that order, the NPSC had ordered Time Warner to seek interconnection agreements with other carriers.¹⁸ The NPSC had the expectation that Time Warner would in fact be entering those markets. Time Warner's accusation

¹⁴ See Comments of Comcast Corporation at 1.

¹⁵ Bates 0132.

¹⁶ *Id.*

¹⁷ See Petition at 7.

¹⁸ See *In the Matter of Time Warner Cable Information Services (Nebraska), LLC, d/b/a Time Warner Cable, Stamford, Connecticut, for a certificate of authority to provide local and interexchange voice services within the State of Nebraska*, Application No. C-3228, GRANTED (November 23, 2004) ("C-3228"). This language is standard language used in the NPSC's local exchange carrier certificate orders.

that the NPSC was “blocking”¹⁹ its entry in that market is untrue. It is unfortunate that some other commenters have simply adopted this mischaracterization in their comments.

Time Warner has the ability to seek and negotiate interconnection with Southeast Nebraska Telephone Company presently. The arguments that the NPSC’s decision somehow denies customers a choice of service providers or that the NPSC is causing delayed investment in the rural market are unfounded.²⁰ The NPSC affirmatively granted Time Warner the ability to offer service throughout the requested territory. Time Warner still has the ability to seek interconnection to compete in those rural areas. The fact is that it has simply chosen not to do so.

Finally, although the NPSC did not make any decision with respect to VoIP providers, the NPSC agrees with the commenters that issues raised by the commenters with respect to VoIP providers will be addressed in the Commission’s IP-Enabled Services NPRM.²¹ The Commission is currently considering the characterization of VoIP service and the rights and obligations of other carriers relative to VoIP. There is no reason to decide those unrelated issues in this proceeding. The NPSC has followed the IP-Enabled Services NPRM and the Intercarrier Compensation²² proceedings and maintains a continuing interest in the outcome of those proceedings. The NPSC

¹⁹ Time Warner’s Petition somehow implies that the NPSC took some direct action against Time Warner, when in reality the NPSC has granted to Time Warner everything that it has formally requested. Time Warner had the opportunity to intervene in the Sprint arbitration case and chose against it.

²⁰ See Sprint Nextel Comments at 9.

²¹ See generally IP-Enabled Services NPRM.

²² See *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket 01-92, Further Notice of Proposed Rulemaking (rel. March 3, 2005).

believes the Commission's current path to resolve issue raised by VoIP providers in this proceeding is best handled within the scope of those generic rulemaking dockets.

III. CONCLUSION

The Petition fails to establish an uncertainty or controversy as it pertains to the NPSC arbitration decision. The NPSC made the correct decision in view of the facts presented in the case. The Petition for Declaratory Ruling filed by Time Warner should be dismissed. In the alternative the relief sought by Time Warner should be denied.

Respectfully Submitted,

The Nebraska Public Service Commission

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Dated: April 25, 2006

Certificate of Service

I, Shana Knutson, do hereby certify that on this 25th day of April, 2006, that a true and correct copy of the foregoing reply comments was sent via electronic mail, to the following:

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